

REPORT DOCUMENTATION PAGE				<i>Form Approved</i> <i>OMB No. 0704-0188</i>	
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing this collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.					
1. REPORT DATE (DD-MM-YYYY) 04-05-2009		2. REPORT TYPE FINAL		3. DATES COVERED (From - To)	
4. TITLE AND SUBTITLE TARGETED KILLINGS: A Legally Viable, High Risk Course of Action.				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) LCDR David C. Terry Paper Advisor (if Any): CDR Sean Henseler, JAGC				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Joint Military Operations Department Naval War College 686 Cushing Road Newport, RI 02841-1207				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION / AVAILABILITY STATEMENT Distribution Statement A: Approved for public release; Distribution is unlimited.					
13. SUPPLEMENTARY NOTES A paper submitted to the Naval War College faculty in partial satisfaction of the requirements of the Joint Military Operations Department. The contents of this paper reflect my own personal views and are not necessarily endorsed by the NWC or the Department of the Navy.					
14. ABSTRACT On 11 December 2005, the Israeli Supreme Court ruled that targeted killings were not strictly prohibited under international law. Analysis of the court case and supporting documents will illustrate that the position taken by the court is sound in it's legal judgment and provides the United States Military and other Government Organizations a powerful tool. Analysis of centers of gravity on the middle to lower end of the range of military operations, with regard to counterinsurgency operations specifically, will show that the center of gravity rests squarely with the local population. In combining the two, it will be shown that just because targeted killings are legal they, for the majority part, run counter to the struggle the United States wages for legitimacy in it's fight so far from home. Operational commanders have many tools in their varied operations fighting insurgencies and terrorism. This paper provides further guidance on the employment of targeted killings, resulting in operational commanders who have less ambiguity on when to employ the tactic, when not to and when to seek legal and higher echelon guidance.					
15. SUBJECT TERMS Targeted Killings, Law of Armed Conflict, Just War.					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 23	19a. NAME OF RESPONSIBLE PERSON Chairman, JMO Dept
a. REPORT UNCLASSIFIED	b. ABSTRACT UNCLASSIFIED	c. THIS PAGE UNCLASSIFIED			19b. TELEPHONE NUMBER (include area code) 401-841-3556

**NAVAL WAR COLLEGE
Newport, R.I.**

TARGETED KILLINGS: A Legally Viable, High Risk Course of Action.

by

David C. Terry

LCDR USN

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature: _____

4 May 2009

Contents

Introduction	1
Legal Analysis	3
COIN COG: The Local Population	9
Operational Analysis	10
Alternate COAs: Two extremes	14
Conclusion	17
Bibliography	19

Abstract

On 11 December 2005, the Israeli Supreme Court ruled that targeted killings were not strictly prohibited under international law. Analysis of the court case and supporting documents will illustrate that the position taken by the court is sound in its legal judgment and provides the United States Military and other Government Organizations a powerful tool. Analysis of centers of gravity on the middle to lower end of the range of military operations, with regard to counterinsurgency operations specifically, will show that the center of gravity rests squarely with the local population. In combining the two, it will be shown that just because targeted killings are legal they, for the majority part, run counter to the struggle the United States wages for legitimacy in its fight so far from home. Operational commanders have many tools in their varied operations fighting insurgencies and terrorism. This paper provides further guidance on the employment of targeted killings, resulting in operational commanders who have less ambiguity on when to employ the tactic, when not to and when to seek legal and higher echelon guidance.

INTRODUCTION

Targeted killings are an often misunderstood tactic that has been utilized by many nation's armed forces during the recent history of military operations. The killing of a specific uniformed officer of an enemy armed force is often mistaken as a targeted killing. An example of this would be the shooting down of two Mitsubishi G4M "Betty" attack aircraft, one carrying ADM Isoroku Yamamoto, as they transited from Rabaul to Bougainville on April 18, 1943 killing Yamamoto and 19 members of his staff and aircrew.¹ This was not a "targeted killing." This was the legitimate use of force between combatants of uniformed armed forces who were in a state of armed conflict with each other.

According to Eban Kaplan of the Council on Foreign Relations, "targeted killings are used by governments to eliminate individuals they view as a threat. Generally speaking, a nation's intelligence, security, or military forces identify the individual in question and carry out an operation intended to kill him or her."² This civilian is targeted for killing, vice arrest and attempted trial, usually due to the fact that he is well protected, often hiding in plain clothes among the local population and knowledge of his whereabouts is highly transient in nature. It is often difficult to gain the requisite knowledge of the target's location and have enough time to mass the force required to safely apprehend the individual with acceptable risk to friendly force. Due to the transient nature of the circumstances, and in order to reduce risk to force, the subject will be targeted for killing (often through the use of substantial air delivered ordnance). As the individual is often hiding amongst the local population, collateral damage is inflicted when innocent bystanders are injured or killed as a result of the strike, often with mixed results as to whether the targeted individual is successfully killed or

¹ Glines, Carroll, *Attack on Yamamoto* (New York: Orion Books, 1990), 95.

² Kaplan, Eban, "Backgrounder, Targeted Killings," *Council on Foreign Relations*, <http://www.cfr.org/publication/9627/> (accessed 23 April 2009).

not. According to Michael L. Gross of the Israeli Society for Applied Philosophy, “Between September 29, 2000 and January 15, 2006 Israeli troops successfully targeted 204 named combatants while killing 115 civilians.”³ These targeted killings were the nexus of a controversial 2005 Israeli Supreme Court case.

It can be shown that in a vacuum targeted killings are a viable tactic. Risk to force is minimal and, if successful, high-level insurgents and their surrounding operators, and the movement as a whole, can be dealt a significant blow. It is different outside the vacuum. Through center of gravity (COG) analysis it can be argued that in counterinsurgency operations, the COG is the local population who is often killed alongside the targeted insurgent. The risk to mission in this targeted killing is manifested as a significant blow to the legitimacy of the United States cause, possible martyrdom of the targeted individual, increased recruitment into the ranks of the insurgent forces, and a net negative effect overall. This is not to say that targeted killings should not be employed at all. Examples of well-executed killings, such as the Predator attack killing Qaed Salim Sinan al-Harethi in Yemen in 2002, are readily available.⁴ But one could argue that the examples of operations with less than satisfactory results outnumber the good. For instance, 6 civilians, including 2 children, were killed and 14 injured in Afghanistan in an air strike on 13 April 2009.⁵

Operational commanders are obliged by international law to, whenever possible, arrest and try, civilians who are acting outside the law. By going outside the law and

³ Gross, Michael, “Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence,” *Journal of Applied Philosophy* 23, no. 3, (2006), 332-3, <http://poli.haifa.ac.il/~mgross/Assassination%20and%20Targeted%20Killing.%20JAP.pdf> (accessed 23 April 2009).

⁴ “U.S. kills al-Qaeda suspects in Yemen,” *USA Today*, http://www.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm (accessed 23 April 2009).

⁵ Oppel Jr., Richard and Waheed Wafa, Abdul, “Civilians Died in Airstrike by NATO, Afghan says,” *New York Times* (13 April 2009), <http://www.nytimes.com/2009/04/14/world/asia/14afghan.html> (accessed 23 April 2009).

employing what some would call an “extra-judiciary execution” the United States is often working counter to the goal of winning over the local population in order to establish a peaceful government who provides regional stability and promotes international peace. Operational commanders must put a targeted killing course of action under strict scrutiny and weigh the benefit of reducing risk to force against the potential risk to mission. This paper argues that whenever possible individuals should be arrested and put on trial, either by an established independent court system or a military court. Ultimately, due to the legitimacy ramifications and risk to mission at the national strategic level, if a targeted killing is the preferred course of action it should pass a strict test or be vetted through higher command.

LEGAL ANALYSIS

The Commander’s Handbook on the Law of Naval Operations tells us “it is DOD policy to comply with the law of armed conflict [LOAC] during all armed conflict, however such conflicts are characterized.”⁶ When the Geneva Conventions were drafted, their purpose was intended to regulate and minimize the impact of large scale state on state armed conflict. It is important to state up front that United States policy is to adhere to those rules during all forms of armed conflict, even when non-state or transnational enemies do not play by the accepted rules.

Integral to the idea of complying with LOAC, is the principle of distinction. “The principle of distinction is concerned with distinguishing combatants from civilians... so as to minimize damage to civilians and civilian objects.”⁷ It is our duty in the United States

⁶ Chief of Naval Operations, “Chapter 5, Principles and Sources of the Law of Armed Conflict,” *The Commander’s Handbook On The Law Of Naval Operations NWP 1-14M* (Washington, DC: CNO, July 2007), 5-2.

⁷ *Ibid.*, 5-3.

military to do everything in our power to distinguish between combatants and civilians and ensure that civilians are protected from the effects of armed conflict.

According to Geneva Convention III, article 4, Combatants have to fit very specific criteria. Some of these are: “under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war...

combatants are entitled to combat immunity - that is, they cannot be prosecuted for their lawful military actions prior to capture.”⁸ If an individual does not fulfill all the criteria, he is a civilian and does not enjoy combatant immunity. Yoram Dinstein, former Charles H. Stockton Professor of International Law at the Naval War College explains, “civilians are not allowed to participate actively in the fighting: if they do so, they lose their status as civilians. But as long as they retain that status, civilians enjoy general protection against dangers arising from military operations.”⁹

Joint Publication 3-0 illustrates the Range of Military Operations (ROMO):¹⁰

QuickTime™ and a
decompressor
are needed to see this picture.

⁸ Ibid., 5-4.

⁹ Dinstein, Yoram, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, UK: Cambridge University Press, 2004), 27.

¹⁰ Chairman, U.S. Joint Chiefs of Staff, “Chapter I, Strategic Context,” *Joint Operations*, Incorporating Change 1, Joint Publication (JP) 3-0, (Washington, DC: CJCS, 13 February 2008), 1-8.

This traditional model of combatant versus civilian has historically worked well in the context of large scale, right side of the ROMO, armed conflict between nation states, as was the norm when The Hague and Geneva Conventions, the basis for LOAC, were written. Much more vague is the center-left of the ROMO, where civilians take part in hostilities in varying ways, such as finance or recruiting, and use the innocent civilian population to mask their operations. Under the Geneva Conventions, these civilians have lost their protection because they are participating in the conflict, but are also not afforded the post-capture protections due to combatants because they don't fulfill the requirements as such. An accepted term used to describe this individual is "unprivileged belligerent." He is a belligerent because he is taking part in the conflict (not a civilian), but is unprivileged due to the fact that he does not adhere to the combatant criteria. Though not explicitly stated in the Geneva Conventions, use of the term "unprivileged belligerent" allows one to classify the actor who fits as neither combatant nor civilian.

When engaged in an armed conflict and operating under the restrictions of LOAC, the nebulous center-left of the ROMO, such as the current counterinsurgency in Iraq and Afghanistan, brings some legal difficulties. Paramount is one's definition of when a civilian is taking "direct part" in the conflict and thus not protected by the Geneva Conventions. One can use the example of an Improvised Explosive Device (IED). Is the man who buys the parts taking "direct part" or only the man who plants or triggers the IED to explode? Clearly the second is, but if one answers yes to the first, then he, legally, can be targeted as an unprivileged belligerent and it is not required to afford him due process. President (Emeritus) Aharon Barak and the Israeli Supreme Court take this stance in *Public Committee Against Torture in Israel v. the Government of Israel* and state that "In our opinion, the

‘direct’ character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who sent him, as well, take a ‘direct part’.”¹¹ If one answers no to the first, or “indeed, among military means, one must choose the means whose harm to the human rights of the harmed person is the smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed... Trial is preferable to use of force.”¹² In the eyes of the Israeli Supreme Court, a liberal definition of the “direct part” requirement is legal and the unprivileged belligerent may be targeted with lethal force as a combatant. However, when feasible, in accordance with the principle of proportionality, the subject should be arrested, a case prepared and a trial held.

Continuing in the context of LOAC, we must also examine the requirement of “for such time as.” The civilian can only be targeted “for such time as” he is taking the aforementioned “direct part.” Much like the grey area of the previous discussion, there is room for interpretation of “for such time as.” Is the civilian only able to be targeted at the specific moment that he is triggering the IED, or is a wider timeframe legally viable? Barak explains the view of the Israeli Supreme Court stating: “the rest between hostilities is nothing other than preparation for the next hostility.”¹³ Again in the eyes of the court, the insurgent is able to be targeted not just at the specific time that he is performing the act of hostility, but over a wider time as well.

While the Israeli Supreme Court holds no jurisdiction over the United States, this case sets important international legal precedence and it can be used as a guide when analyzing

¹¹ Barak, Aharon, Beinisch, Dorit and Rivlin, Eliezer, *Public Committee Against Torture in Israel v. the Government of Israel*, (11 December 2005), 22, http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (accessed 16 March 2009).

¹² Ibid., 24.

¹³ Ibid., 23.

the subject. In addition to its ruling, the court sets important limits which merit discussion as well. Ultimately the court rules that “it cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law... the legality of each individual such act must be determined in light of it.”¹⁴ The court set limits by stating that a targeted killing’s “harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used... if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test.”¹⁵ Ultimately the operational commander must look at a specific course of action and decide whether collateral damage to innocent civilians outweighs the risk to force in an alternate course of action.

Counterinsurgency brings with it another legal aspect. If established as the occupying force, no longer involved in armed conflict, the United States is bound by Articles 42 to 56 of the Hague Convention of 1907, commonly referred to as the International Law of Belligerent Occupation. Article 43 specifically states that “the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”¹⁶ This law, when boiled down, says that the occupying force must enforce, and obey, the laws of the territory occupied or customary international law if none existed or were contrary. The occupying military force

¹⁴ Ibid., 41.

¹⁵ Ibid., 24

¹⁶ “Section III, Military Authority Over The Territory Of The Hostile State,” *Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 1907*, http://avalon.law.yale.edu/20th_century/hague04.asp (accessed 23 April 2009).

must take on the roles and responsibility of law enforcement. As Dinstein notes, “The LO[I]AC right to a fair trial, with all judicial guarantees (as detailed in Article 75(4)), is vouchsafed in customary international law.”¹⁷

In order to facilitate upcoming recommendations, a discussion of Presidential Findings is also warranted. The nature of the conflict changes when the unprivileged belligerent is hiding in a sovereign foreign country not engaged in the armed conflict. As Dinstein notes, “In the *Corfu Channel* case of 1949, the International Court of Justice pronounced that every State is under an obligation ‘not to allow knowingly its territory to be used for acts contrary to the rights of other States’.”¹⁸ Under international law, that country has an obligation to arrest and extradite the individual. If said country will not, or cannot, arrest the individual the United States, through a Presidential Finding (governed through Section 413b of Title 50, United States Code),¹⁹ will target the individual. As Seymour Hersh reports, “under federal law, a Presidential Finding, which is highly classified, must be issued when a covert intelligence operation gets under way and, at a minimum, must be made known to Democratic and Republican leaders in the House and the Senate and to the ranking members of their respective intelligence committees - the so-called Gang of Eight.”²⁰ Traditionally this is done through the Central Intelligence Agency, but any government asset can be used and a specific “lethal” Presidential Finding can be issued explicitly authorizing the use of force. The Presidential Finding is the key point. The ramifications throughout the

¹⁷ Dinstein, Yoram, *The International Law of Belligerent Occupation* (Cambridge, UK: Cambridge University Press, 2009), 143.

¹⁸ Dinstein, Yoram, *War, Aggression and Self-Defence*, Fourth Edition (Cambridge, UK: Cambridge University Press, 2005), 206.

¹⁹ “Title 50, Chapter 15, Subchapter III, Section 413b. Presidential approval and reporting of covert actions,” *United States Code*, http://www.law.cornell.edu/uscode/html/uscode50/usc_sec_50_00000413---b000-.html (accessed 25 April 2009).

²⁰ Hersh, Seymour, “Preparing The Battlefield, The Bush Administration steps up it’s secret moves against Iran,” *The New Yorker* (7 July 2008), http://www.newyorker.com/reporting/2008/07/07/080707fa_fact_hersh (accessed 23 April 2009).

international community at the National Strategic level are so great that the order to execute an operation in the territory of another sovereign state must come directly from the top.

COIN CENTER OF GRAVITY: THE LOCAL POPULATION

A central tool the operational commander uses in designing an operation within a conflict at any point on the ROMO is analysis of the Center of Gravity, or COG. Dr. Joe Strange of the United States Marine Corps War College defines a COG as “a strength, either moral or physical, and a dynamic and powerful agent in its own right.”²¹ For example, in conflicts on the right side of the ROMO, COGs are usually major combat forces that can take and hold territory and force their will upon the enemy. Through operational level analysis and operational art, planners can identify an enemy COG, assess its capabilities, requirements and vulnerabilities, enabling them to design a scheme to defeat the COG and bring the conflict to the commander’s desired endstate.

In the protracted conflicts in Iraq and Afghanistan, and for center-left of the ROMO operations in general, there is no major combat force. It can be argued that the local population who harbor and assist, or at a minimum tolerate, the insurgents blending in amongst them, holds this moral force, or COG. If the local population can be convinced that it is in their interest to take an active part in exposing those insurgents, they can be successfully exposed, removed from the population and peace and stability can continue to be established. This position is supported by doctrine, specifically the draft Joint Publication 3-24, Counterinsurgency Operations, which states, “in generic terms, the strategic end state

²¹ Strange, Joe and Iron, Richard, “Part 2: The CG-CC-CR-CV Construct: A Useful Tool to Understand and Analyze the Relationship between Centers of Gravity and their Critical Vulnerabilities,” *Understanding Centers of Gravity and Critical Vulnerabilities*, 1, <http://www.au.af.mil/au/awc/awcgate/usmc/cog2.pdf> (accessed 26 April 2009).

normally is isolation of the insurgents from the population, and this isolation is maintained by, with, and through the population—not forced upon the population.”²² Operational commanders must constantly strive to develop schemes that properly account for the Center of Gravity and mitigate any risks a single operation might have on the endstate goals.

OPERATIONAL ANALYSIS

In planning operations the commander must weigh many issues. Central to the current discussion in regards to targeted killings are the principles of proportionality, restraint and legitimacy. Under the idea of *jus in bello*, or justice in war, proportionality, the Encyclopedia of Philosophy explains, “requires tempering the extent and violence of warfare to minimize destruction and casualties. It is broadly utilitarian in that it seeks to minimize overall suffering, but it can also be understood from other moral perspectives, for instance, from harboring good will to all (Kantian ethics).”²³ This desire to mitigate impact on the civilian population is integral to the mission of the United Nations, where member nations strive “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”²⁴ Proportionality is addressed in Joint Publication 3-0 which states, “JFCs

²² Chairman, U.S. Joint Chiefs of Staff, “Chapter III, Counterinsurgency,” *Counterinsurgency Operations*, Final Coordination, Joint Publication (JP) 3-24, (Washington, DC: CNO, XX Month 2009), III-4.

²³ “Just War Theory: The Principles of *Jus in Bello*,” *The Online Encyclopedia of Philosophy*, <http://www.utm.edu/research/iep/j/justwar.htm#H3> (accessed 24 April 2009).

²⁴ Chairman, U.S. Joint Chiefs of Staff, “Chapter I: Purposes and Principles,” *Charter of the United Nations*, Article 1, <http://www.un.org/aboutun/charter/chapter1.shtml> (accessed 24 April 2009).

must deliver fires discriminately to create desired effects while balancing the law of war principles of military necessity, proportionality, and limiting unnecessary suffering.”²⁵

The definition of restraint can be also be found in Joint Publication 3-0 where it states that, “the purpose of restraint is to limit collateral damage and prevent the unnecessary use of force... A single act could cause significant military and political consequences; therefore, judicious use of force is necessary.”²⁶ These “significant military and political consequences” can be, generically, summed up as risk to mission. Legitimacy, Joint Publication 3-0 goes on to explain, “is based on the legality, morality, and rightness of the actions undertaken. Legitimacy is frequently a decisive element. Interested audiences may include the foreign nations, civil populations in the operational area, and the participating forces.”²⁷ Legitimacy in respect to that civil population is crucial when seen as the COG.

Proportionality and restraint feed directly into the principle of legitimacy. With a COG of the local population, legitimacy is the key to achieving the goal of defeating a counterinsurgency. Beatrice Pouligny, a professor at the Institute of Political Science and former UN worker tells us, “legitimacy is built up during the mission. The intervening forces are judged by results: on what they say they intend to do, on what they actually do, and on how they behave and face up to their responsibilities... A major difficulty in building legitimacy... arises from the fact that it is most of all dependent on perception.”²⁸

Looking at an operation from the perspective of the COG, when one places the concept of a targeted killing against this background, potential difficulties can be identified.

²⁵ Chairman, U.S. Joint Chiefs of Staff, “Chapter III, Joint Functions, Section 4, Fires,” *Joint Operations, Incorporating Change 1, Joint Publication (JP) 3-0*, (Washington, DC: CJCS, 13 February 2008), III-22.

²⁶ Chairman, U.S. Joint Chiefs of Staff, “Appendix A, Principles of Joint Operations, Section A, Principles Of War,” *Joint Operations, Incorporating Change 1, Joint Publication (JP) 3-0*, (Washington, DC: CJCS, 13 February 2008), A-3.

²⁷ *Ibid.*, A-4.

²⁸ Pouligny, Beatrice, *Peace Operations Seen from Below, UN Missions and Local People* (Bloomfield, CT: Kumarian Press, 2006), 181.

Take the notional case of a Hellfire missile delivered from an orbiting Predator drone targeting a known insurgent driving through a neighborhood. The order is given to strike the target and the insurgent is killed, along with a number of civilian casualties. If the local population, and the larger international community as well, see the situation as an occupation vice a continuing armed conflict (as is the perception of Iraq and Afghanistan), the killing will be seen as extra-judicial. It will further be seen as an indiscriminant act of violence, out of proportion to the threat imposed by the subject and not restrained from placing innocent citizens at mortal risk. A pattern of this type of disproportionate violence could impinge on the legitimacy of the operation and ultimately increases risk to mission. As Joint Publication 3-24 tells us, “Legitimacy is the main objective. The primary objective of any COIN operation is to foster development of effective governance by a legitimate government.”²⁹ If the people do not accept the rule of the government (either the interim governance of the occupier or the permanent governance of the local body) then risk to mission is high. In order to preserve this often tenuous legitimacy, when at all possible the necessary force should be brought to bear and the subject should be arrested and tried.

This is no easy task and there is no assumption that it will be. Against an enemy who hides amongst the population, knowledge of his whereabouts is often fleeting. On the high moral ground Americans believe they occupy, many things aren’t easy. As a society Americans strive to cope with these roadblocks. As President Obama recently said to the Central Intelligence Agency staff, “I understand that it’s hard when you are asked to protect the American people against people who have no scruples and would willingly and gladly

²⁹ Chairman, U.S. Joint Chiefs of Staff, “Chapter III, Counterinsurgency, Section 4. Principles of Counterinsurgency,” *Counterinsurgency Operations*, Final Coordination, Joint Publication (JP) 3-24, (Washington, DC: CNO, XX Month 2009), III-10.

kill innocents.”³⁰ The President further remarked, “what makes the United States special, and what makes you special, is precisely the fact that we are willing to uphold our values and ideals even when it's hard -- not just when it's easy.”³¹

Much of the philosophy behind just war theory is founded in traditional Christian values. But what are our COG's values? As the COG in Iraq and Afghanistan is mostly Islamic, that population might not look at things the same way. Islam has an intricately structured series of laws, which are supposed to be adhered to strictly. When analyzed, just war theory is, in fact, codified in the roots of Islam, from the Prophet Muhammad himself. John Kelsay, in his book *Islam and War*, tells us “Muhammad goes on to forbid treachery and mutilation and, most important in connection with our interests, orders his forces not to kill children... He [of the enemy] who has reached puberty should be killed, but he who has not should be spared. The Apostle of God prohibited the killing of women. The Apostle of God said: ‘You may kill the adults of the unbelievers, but spare their minors – the youth’.”³² So not only is the killing of women and children philosophically and morally questionable in Islamic tradition, but forbidden by Sacred Law. We can see that the viewpoint of the local population could be significantly affected by their religious convictions when assessing the validity of an air strike and its collateral damage in the form of civilian casualties.

The position of this paper is not to say that targeted killings should not be employed at all. In rare circumstances it may be preferred to kill a subject vice give him an audience at a trial, or if he is so well protected or harbored in such strongly held enemy terrain that

³⁰ Kelly, Mary Louise, “All Things Considered,” *National Public Radio* (20 April 2009), Audio, <http://www.npr.org/templates/story/story.php?storyId=103295550&ft=1&f=1014> (accessed 24 April 2009).

³¹ Warrick, Joby, “Obama Cites CIA's Possible 'Mistakes' But Vows Support, President Is Met With Enthusiasm,” *The Washington Post* (21 April 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/20/AR2009042002157.html> (accessed 24 April 2009).

³² Kelsay, John, *Islam and War A Study in Comparative Ethics* (Louisville, KY: Westminster / John Knox Press, 1993), 59.

capture is unfeasible. Barak explicitly states: “arrest investigation, and trial are not means which can always be used. At times it involves a risk so great to the lives of the soldiers, that it is not required... However it is a possibility which should always be considered.”³³

Precedence has been set by the Israeli Supreme Court that may allow the operational commander, under a wide interpretation of LOAC, to order the strike. This option should only be exercised in extreme circumstances against the highest level insurgents where a case can be shown as to why the killing was undertaken vice capture and trial. Under the time constraints of these fleeting targets, the commander must put the targeted killing course of action to a specific test. The test is this: if, and only if, the commander believes that risk to forces is impossibly great and the case could be put in front of the President and come away with a “lethal” Presidential Finding, then the course of action should proceed. If there is any question as to whether the President’s signature would be forthcoming, risk to mission is too great and guidance from higher echelon command, up to or including an actual Presidential Finding, should be sought.

ALTERNATE COAs: TWO EXTREMES

There are two alternate COAs to the one advocated in this paper and a strong case could be built in either diametrically opposed direction. On the one hand, if the counterinsurgency is categorized as armed conflict and a liberal interpretation of LOAC is taken, military efficiency at the tactical level would support a course of action of employing targeted killings as often as subject locations could be fixed and fires brought to bear. On the

³³ Barak, Aharon, Beinisch, Dorit and Rivlin, Eliezer, *Public Committee Against Torture in Israel v. the Government of Israel*, (11 December 2005), 24, http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (accessed 16 March 2009).

extreme opposite of the scale, if one takes a strict interpretation of the “direct part” and “for such time as” requirements or categorizes the conflict as no longer an armed conflict and thus covered by the Law of Belligerent Occupation, a course of action of never employing targeted killings could be used. Both of these are supportable positions within the grey areas of international law and operational design.

A traditional military pundit would be quick to argue the first point. If one categorizes the operation as armed conflict and uses a liberal interpretation of the “direct part” and “for such time as” requirements of LOAC, at the tactical level targeted killings are an extremely efficient tactic and are supported by many of the traditional principles of joint operations. With robust intelligence support to fix targets and the capability in place to strike quickly and decisively at a moments notice, the principles of objective, offensive, mass, economy of force, maneuver, security, surprise and simplicity are all covered. Our example of a Hellfire attack from a Predator drone achieves the objective of killing the unprivileged belligerent. It maintains the overall offensive against an often wily enemy. It has “a decisive effect in a short period of time,”³⁴ in accordance with mass. It uses minimal assets to achieve the objective while doing it with little risk to force. The threat of surprise keeps the enemy constantly looking over his shoulder. And, it does all this in a relatively simple way. In a vacuum, the targeted killing is a brutally efficient way to deal with insurgents who blend into the population and don’t fight in accordance with the framework of *jus in bello*. This analysis, however, doesn’t account for risk to mission. If one fails to apply the proportionality test and exceeds acceptable levels of collateral damage in the eyes of the COG, then risk to mission at the theater level can be significantly increased.

³⁴ Chairman, U.S. Joint Chiefs of Staff, “Appendix A, Principles of Joint Operations, Section A, Principles of War,” *Joint Operations*, Incorporating Change 1, Joint Publication (JP) 3-0, (Washington, DC: CJCS, 13 February 2008), A-1.

A second course of action proceeds in the completely opposite direction. If under armed conflict and one makes a strict interpretation of the “direct part” and “for such time as” requirements in regards to LOAC, then a subject is only taking that “direct part” at very specific times, such as when physically triggering the example IED. Only at this time is protection lost and only for this brief moment is lethal force allowed. Dr. Helen Keller, Professor of Public International Law at the University of Zurich professes this point in her 2008 analysis of *Public Committee Against Torture in Israel v. the Government of Israel*. In her analysis she states, “a very close correlation should exist between the act performed by the civilian and the threat to the adversary party. Support for this stance can be found in the Report of the Third Expert Meeting co-organized by the ICRC and TMZ Asser Institute, where experts appeared to agree that the identification of an act which constitutes ‘direct participation in hostilities’ requires ‘some degree of causal relationship between the act and the ensuing harm to the adversary’ ... The difficulty, however, was that a ‘sufficient’ causal link could not be objectively measured.”³⁵ Under this framework the subject “can only be targeted when they carry arms openly before and during an armed action (Article 44(3) of Additional Protocol I)...However within the framework of the present conflict, he makes allowance for targeting a civilian, if he or she does not respond to summons.”³⁶ In other words, the subject should retain his protection as a civilian until he fails to respond to those attempting to detain him.

If one characterizes the conflict as no longer an armed conflict but as an occupation, The Law of Belligerent Occupation portion of the Hague Convention of 1907, vice LOAC, is

³⁵ Keller, Helen and Forowicz, Magdalena, “A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court’s Judgment on Targeted Killing,” *Leiden Journal of International Law*, 21 (2008), 209.

³⁶ *Ibid.*, 209.

in effect and also supports this argument. Stromseth, Wippman and Brooks, in their book *Can Might Make Rights?* note that “interveners themselves must comport with international standards of conduct or they will be soundly and justifiably criticized... understandable outrage... will erupt when interveners fail to abide by fundamental standards of international law. If interveners seek to strengthen the rule of law domestically – and encourage lawful behavior by local authorities – they must not undermine their own credibility by violating basic legal norms themselves.”³⁷ This second course of action provides what may be the safest path on the struggle for legitimacy. By always opting for arrest and trial, the principles of restraint and proportionality should never be taken into question. There are problems with this COA that the commander must weigh. In an operation to arrest an unprivileged belligerent, risk to force at the tactical level is significant and by specifically removing a tool from the commander’s toolbox, the insurgents gain a tactical advantage of knowing he will not be targeted if hiding amongst the population and the offensive could potentially be lost.

CONCLUSION

By taking a synergistic approach the operational commander can achieve desired tactical results while also achieving the theater-strategic objective of establishing a self-ruling government contributing international peace and cooperation. For the majority of cases operational commanders should strive to detain subjects, build a case in either local independent courts (preferably) or a military court, and put them on trial. This is no easy task, but supports the goals of legitimacy, restraint and proportionality. Counterinsurgency is on the spectrum of armed conflict and as such legally, through precedent set by the Israeli

³⁷ Stromseth, Jane, Wippman, David and Brooks, Rosa, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (New York, NY: Cambridge University Press, 2006), 51.

Supreme Court and liberal interpretation of LOAC, it can be argued that operational commanders have the ability to order a targeted killing. The view from outside may differ and operational commanders must exercise a strict test on every targeted killing course of action, weighing the benefit of the tactical objective and decreased risk to force against the potential increase in risk to mission brought on by negative repercussions within the local populace (the COG). He must be able to show beyond a doubt why the subject was targeted and why it was unfeasible to arrest and try him. He must be confident that, had the time required been available, a Presidential Finding would have been issued. In order to ensure that the intent is being upheld, targeted killings should be examined thoroughly after the fact. The Israeli Supreme court supports this point when it says “after an attack on a civilian suspected on taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed.”³⁸ If there is any question in regards to the legality or consequences of such an order, potential risk to mission is too great and Judge Advocate and higher-level guidance should be sought, up to and including a Presidential Finding itself. To sum it up in a single sentence: Just because you can, doesn’t mean you should.

BIBLIOGRAPHY

Barak, Aharon, Beinisch, Dorit and Rivlin, Eliezer. *Public Committee Against Torture in Israel v. the Government of Israel*, (11 December 2005).
http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (accessed 16 March 2009).

“Chapter I: Purposes and Principles.” *Charter of the United Nations*, Article 1.
<http://www.un.org/aboutun/charter/chapter1.shtml> (accessed 24 April 2009).

³⁸ Barak, Aharon, Beinisch, Dorit and Rivlin, Eliezer, *Public Committee Against Torture in Israel v. the Government of Israel*, (11 December 2005), 24,
http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (accessed 16 March 2009).

Dinstein, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge, UK: Cambridge University Press, 2004.

-----, *The International Law of Belligerent Occupation*. Cambridge, UK: Cambridge University Press, 2009.

-----, *War, Aggression and Self-Defence*, 4th Ed. Cambridge, UK: Cambridge University Press, 2005.

Glines, Carroll. *Attack on Yamamoto*. New York: Orion Books, 1990.

Gross, Michael. "Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence." *Journal of Applied Philosophy* 23, no. 3. (2006).

<http://poli.haifa.ac.il/~mgross/Assassination%20and%20Targeted%20Killing,%20JAP.pdf> (accessed 23 April 2009).

Hersh, Seymour. "Preparing The Battlefield, The Bush Administration steps up it's secret moves against Iran." *The New Yorker*. (7 July 2008).

http://www.newyorker.com/reporting/2008/07/07/080707fa_fact_hersh (accessed 23 April 2009).

"Just War Theory: The Principles of *Jus in Bello*." *The Online Encyclopedia of Philosophy*. <http://www.utm.edu/research/iep/j/justwar.htm#H3> (accessed 24 April 2009).

Kaplan, Eban. "Backgrounder, Targeted Killings." *Council on Foreign Relations*.

<http://www.cfr.org/publication/9627/> (accessed 23 April 2009).

Keller, Helen and Forowicz, Magdalena. "A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court's Judgment on Targeted Killing." *Leiden Journal of International Law*, 21. (2008).

Kelly, Mary Louise. "All Things Considered." *National Public Radio*. (20 April 2009).

Audio, <http://www.npr.org/templates/story/story.php?storyId=103295550&ft=1&f=1014> (accessed 24 April 2009).

Kelsay, John. *Islam and War A Study in Comparative Ethics*. Louisville, KY: Westminster / John Knox Press, 1993).

Oppel Jr., Richard and Waheed Wafa, Abdul. "Civilians Died in Airstrike by NATO, Afghan says." *New York Times*. (13 April 2009).

<http://www.nytimes.com/2009/04/14/world/asia/14afghan.html> (accessed 23 April 2009).

Pouligny, Beatrice. *Peace Operations Seen from Below, UN Missions and Local People*. Bloomfield, CT: Kumarian Press, 2006.

“Section III Military Authority Over The Territory Of The Hostile State.” *Laws of War: Laws and Customs of War on Land (Hague IV). October 18, 1907.*

http://avalon.law.yale.edu/20th_century/hague04.asp (accessed 23 April 2009).

Strange, Joe and Iron, Richard. “Part 2: The CG-CC-CR-CV Construct: A Useful Tool to Understand and Analyze the Relationship between Centers of Gravity and their Critical Vulnerabilities.” *Understanding Centers of Gravity and Critical Vulnerabilities.*

<http://www.au.af.mil/au/awc/awcgate/usmc/cog2.pdf> (accessed 26 April 2009).

Stromseth, Jane, Wippman, David and Brooks, Rosa. *Can Might Make Rights? Building the Rule of Law After Military Interventions.* New York, NY: Cambridge University Press, 2006.

“Title 50, Chapter 15, Subchapter III, Section 413b. Presidential approval and reporting of covert actions.” *United States Code.*

http://www.law.cornell.edu/uscode/html/uscode50/usc_sec_50_00000413---b000-.html

(accessed 25 April 2009).

USA Today. “U.S. kills al-Qaeda suspects in Yemen.”

http://www.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm (accessed 23 April 2009).

U.S. Office of the Chairman of the Joint Chiefs of Staff. *Joint Operations*, incorporating Change 1. Joint Publication (JP) 3-0. Washington, DC: CJCS, 13 February 2008.

-----, *Counterinsurgency Operations*. Final Coordination. Joint Publication (JP) 3-24. Washington, DC: CJCS, XX Month 2009.

U.S. Office of the Chief of Naval Operations. *The Commander's Handbook On The Law Of Naval Operations*. Naval Warfare Publication (NWP) 1-14M. (Washington, DC: CNO, July 2007).

Warrick, Joby. “Obama Cites CIA's Possible 'Mistakes' But Vows Support, President Is Met With Enthusiasm.” *The Washington Post.* (21 April 2009).

<http://www.washingtonpost.com/wp-dyn/content/article/2009/04/20/AR2009042002157.html> (accessed 24 April 2009).